

**In the United States Court of Federal Claims**  
**OFFICE OF SPECIAL MASTERS**  
**No. 16-738V**  
(not to be published)

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THEODORE MARTINEZ *and* \*  
SARAH MARTINEZ \*  
*as parents and natural guardians of W.M.,* \*  
\*  
Petitioners, \*  
\*  
v. \*  
\*  
SECRETARY OF HEALTH AND \*  
HUMAN SERVICES, \*  
\*  
Respondent. \*  
\*\*\*\*\*

Chief Special Master Corcoran

Filed: May 22, 2023

*David John Carney, Green & Schafle LLC, Philadelphia, PA, for Petitioners.*

*Naseem Kourosh, U.S. Department of Justice, Washington, DC, for Respondent.*

**DECISION GRANTING FINAL AWARD OF ATTORNEY’S FEES AND COSTS<sup>1</sup>**

On June 22, 2016, Theodore and Sarah Martinez, on behalf of their minor daughter, W.M., filed a petition for compensation under the National Vaccine Injury Compensation Program (the “Program”).<sup>2</sup> ECF No. 1. Petitioners alleged that the diphtheria-tetanus-acellular pertussis and rotavirus vaccines administered to W.M. on June 26, 2013, caused her to develop transverse myelitis. After a November 2021 hearing, I issued a decision denying entitlement (ECF No. 107), and although Petitioners appealed my determination, their Motion for Review was denied (ECF No. 115), and they have not sought further review.

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<sup>1</sup> In accordance with Vaccine Rule 18(b), Petitioner has fourteen days to identify and move to redact from the Decision medical or other information, the disclosure of which would constitute an unwarranted invasion of privacy. If, upon review, I agree that the identified material fits within this definition, I will redact such material from public access. Otherwise, the whole Decision will be available to the public.

<sup>2</sup> The Vaccine Program comprises Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3758, codified as amended at 42 U.S.C. §§ 300aa-10 through 34 (2012) [hereinafter “Vaccine Act” or “the Act”]. Individual section references hereafter will be to § 300aa of the Act (but will omit that statutory prefix).

Petitioners have now filed a motion for a final award of attorney’s fees and costs. Motion, dated March 20, 2023 (ECF No. 117). Petitioners have previously sought and were awarded fees on an interim basis (ECF No. 102). They now request a total of \$51,332.38, reflecting \$50,702.50 in fees incurred for the services of Mr. David Carney and paralegals, and \$629.88 in costs, from April 2022 to present day, largely reflecting the cost of appeal. ECF No. 117 at 3. Respondent reacted to the final fees request on March 21, 2023. Response, dated March 21, 2023 (ECF No. 118). Respondent agrees that Petitioners have satisfied the statutory requirements for a fees award, and otherwise defers the calculation of the amount to be awarded to my discretion. Response at 2–3.

For the reasons set forth below, I hereby **GRANT** Petitioners’ motion, awarding fees and costs in the total amount of **\$51,332.38**.

## ANALYSIS

### I. Petitioners’ Claim had Reasonable Basis

Although the Vaccine Act only guarantees a fees award to successful petitioners, a special master may also award fees and costs in an unsuccessful case if: (1) the “petition was brought in good faith”; and (2) “there was a reasonable basis for the claim for which the petition was brought.” Section 15(e)(1). I have in prior decisions set forth at length the criteria to be applied when determining if a claim possessed “reasonable basis” sufficient for a fees award. *See, e.g., Sterling v. Sec’y of Health & Hum. Servs.*, No. 16-551V, 2020 WL 549443, at \*4 (Fed. Cl. Spec. Mstr. Jan. 3, 2020). Importantly, establishing reasonable basis does not *automatically* entitle an unsuccessful claimant to fees, but is instead a threshold obligation; fees can still thereafter be limited, if unreasonable, or even denied entirely.

A claim’s reasonable basis<sup>3</sup> must be demonstrated through some objective evidentiary showing. *Cottingham v. Sec’y of Health & Hum. Servs.*, 971 F.3d 1337, 1344 (Fed. Cir. 2020) (citing *Simmons v. Sec’y of Health & Hum. Servs.*, 875 F.3d 632, 635 (Fed. Cir. 2017)). This objective inquiry is focused on the *claim*—counsel’s conduct is irrelevant (although it may bulwark good faith). *Simmons*, 875 F.3d at 635. In addition, reasonable basis inquiries are not static—they evaluate not only what was known at the time the petition was filed, but also take into account what is learned about the evidentiary support for the claim as the matter progresses. *Perreira v. Sec’y of Health & Hum. Servs.*, 33 F.3d 1375, 1377 (Fed. Cir. 1994) (upholding the finding that a reasonable basis for petitioners’ claims ceased to exist once they had reviewed their expert’s opinion, which consisted entirely of unsupported speculation). As a result, a claim can

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<sup>3</sup> Because this claim’s good faith is not in dispute, I do not include a discussion of the standards applicable to that fees prong.

“lose” reasonable basis over time.

The standard for finding the existence of reasonable basis is lesser (and thus inherently easier to satisfy) than the preponderant standard applied when assessing entitlement, as cases that fail can still have sufficient objective grounding for a fees award. *Braun v. Sec’y of Health & Hum. Servs.*, 144 Fed. Cl. 72, 77 (2019). The Court of Federal Claims has affirmed that “[r]easonable basis is a standard that petitioners, at least generally, meet by submitting evidence.” *Chuisano v. Sec’y of Health & Hum. Servs.*, 116 Fed. Cl. 276, 287 (Fed. Cl. 2014) (internal quotations omitted) (affirming special master). The factual basis and medical support for the claim is among the evidence that should be considered. *Carter v. Sec’y of Health & Hum. Servs.*, 132 Fed. Cl. 372, 378 (Fed. Cl. 2017). Under the Vaccine Act, special masters have “maximum discretion” in applying the reasonable basis standard. *See, e.g., Silva v. Sec’y of Health & Hum. Servs.*, 108 Fed. Cl. 401, 401–02 (Fed. Cl. 2012).<sup>4</sup>

Petitioner’s claim was ultimately unsuccessful, but I find there was more than a sufficient objective basis to entitle them to a fees and costs award. The core injury was substantiated, and the matter upon which the case turned (timing of onset) was reasonably-disputed, with both sides able to marshal record evidence to support their position. And the eventual outcome of the case does not negate its objective basis. Thus, a final award of fees and costs in this matter is permissible. Because I find no reason otherwise to deny a fees award, I will allow one herein.

## II. Calculation of Fees

Determining the appropriate amount of the fees award is a two-part process. The first part involves application of the lodestar method—“multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate.” *Avera v. Sec’y of Health & Hum. Servs.*, 515 F.3d 1343, 1347–48 (Fed. Cir. 2008) (quoting *Blum v. Stenson*, 465 U.S. 886, 888 (1984)). The second part involves adjusting the lodestar calculation up or down to take relevant factors into consideration. *Id.* at 1348. This standard for calculating a fee award is considered applicable in most cases where a fee award is authorized by federal statute. *Hensley v. Eckerhart*, 461 U.S. 424, 429–37 (1983).

An attorney’s reasonable hourly rate is determined by the “forum rule,” which bases the proper hourly rate to be awarded on the forum in which the relevant court sits (Washington, D.C., for Vaccine Act cases), *except* where an attorney’s work was not performed in the forum and there is a substantial difference in rates (the so-called “*Davis* exception”). *Avera*, 515 F.3d at 1348 (citing *Davis Cty. Solid Waste Mgmt. & Energy Recovery Special Serv. Dist. v. U.S. Envtl. Prot.*

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<sup>4</sup> *See also Chuisano*, 116 Fed. Cl. at 285 (cautioning against rigid rules or criteria for reasonable basis because they would subvert the discretion of special masters and stating that an amorphous definition of reasonable basis is consistent with the Vaccine Act as a whole).

*Agency*, 169 F.3d 755, 758 (D.C. Cir. 1999)). A 2015 decision established the hourly rate ranges for attorneys with different levels of experience who are entitled to the forum rate in the Vaccine Program. *See McCulloch v. Sec’y of Health & Hum. Servs.*, No. 09-293V, 2015 WL 5634323, at \*19 (Fed. Cl. Spec. Mstr. Sept. 1, 2015).

Petitioners requests the following rates for their attorneys, based on the years work was performed:

	2022	2023
<b>David Carney (Attorney)</b>	\$400.00	\$425.00
<b>Adam Green (Attorney)</b>	\$425.00	-

ECF No. 117 at 16.

The attorneys at Green & Schafle practice in Philadelphia, PA—a jurisdiction that has been deemed “in forum.” Accordingly, he should be paid forum rates as established in *McCulloch*. *See Hock v. Sec’y of Health & Hum. Servs.*, No. 17-168V, 2021 WL 1733520, at \*2 (Fed. Cl. Spec. Mstr. Apr. 8, 2021). The rates requested for Mr. Carney and Mr. Green are consistent with what has previously been awarded, in accordance with the Office of Special Masters’ fee schedule.<sup>5</sup> *Morgan v. Sec’y of Health & Hum. Servs.*, No. 19-1105V, 2021 WL 3056271, at \*2 (Fed. Cl. Spec. Mstr. June 28, 2021). I thus find no cause to reduce them in this instance. And I deem the time devoted to the matter to be reasonable. I will therefore award all fees requested without adjustment.

### **III. Calculation of Costs**

Just as they are required to establish the reasonableness of requested fees, petitioners must also demonstrate that requested litigation costs are reasonable. *Presault v. United States*, 52 Fed. Cl. 667, 670 (2002); *Perreira v. Sec’y of Dep’t of Health & Hum. Servs.*, 27 Fed. Cl. 29, 34 (1992). Reasonable costs include the costs of obtaining medical records and expert time incurred while working on a case. *Fester v. Sec’y of Health & Hum. Servs.*, No.10-243V, 2013 WL 5367670, at \*16 (Fed. Cl. Spec. Mstr. Aug. 27, 2013). When petitioners fail to substantiate a cost item, such as by not providing appropriate documentation to explain the basis for a particular cost, special masters have refrained from paying the cost at issue. *See, e.g., Gardner-Cook v. Sec’y of Health & Hum. Servs.*, No. 99-480V, 2005 WL 6122520, at \*4 (Fed. Cl. Spec. Mstr. June 30, 2005).

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<sup>5</sup> OSM Attorneys’ Forum Hourly Rate Fee Schedules, <https://www.uscfc.uscourts.gov/node/2914> (last visited May 19, 2023).

Petitioners seek \$629.88 in outstanding costs, including the medical record retrieval costs, travel expenses, and copying charges. ECF No. 117 at 3, 22–23. All are commonly incurred in the Vaccine Program, and are reasonable herein. All requested costs shall also be awarded.

### **CONCLUSION**

Based on the foregoing, and in the exercise of the discretion afforded to me in determining the propriety of a final fees award, I **GRANT** Petitioners' Motion for Attorney's Fees and Costs in its entirety and award a total of **\$51,332.38** reflecting \$50,702.50 in attorney's fees and \$629.88 in costs in the form of a check made jointly payable to Petitioners and their attorney Mr. David Carney.

In the absence of a motion for review filed pursuant to RCFC Appendix B, the Clerk of the Court **SHALL ENTER JUDGMENT** in accordance with the terms of this Decision.<sup>6</sup>

**IT IS SO ORDERED.**

s/ Brian H. Corcoran

Brian H. Corcoran

Chief Special Master

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<sup>6</sup> Pursuant to Vaccine Rule 11(a), the parties may expedite entry of judgment if (jointly or separately) they file notices renouncing their right to seek review.